OPINION OF MR ADVOCATE GENERAL LENZ
delivered on 21 October 1987 *

Mr President,
Members of the Court,

A — Facts

1. The case upon which I am now delivering my Opinion turns on the question whether clawback may be charged on exports of sheepmeat from Great Britain to the remainder of the Community even when no variable slaughter premium within the meaning of Article 9 of Council Regulation (EEC) No 1837/80 of 27 June 1980 on the common organization of the market in sheepmeat and goatmeat [1] has been granted in respect of the exported meat.

I shall go into details in my analysis of the case. For the rest I refer to the Report for the Hearing.

B — Analysis

(1) *The Commission's competence to adopt the contested regulations*

3. In examining the question whether there is a sufficient legal basis for the adoption of the contested regulations in Article 9 (3) of Regulation No 1837/80, in the version set out in Regulation No 871/84, I consider it appropriate to recall that provision:

'3. Should the premium referred to in paragraph 1 be paid in region 5, the Commission shall take the necessary measures to ensure than an amount *equivalent to the premium actually granted* is charged on *all*[2] products as referred to in Article 1 (a) and (c) when they leave the region concerned.'

4. Both parties to the proceedings base their submissions in the first place on an interpretation of the wording of the provision but in so doing they reach diametrically opposed conclusions because they attach differing weight to various parts of the provision.

5. The applicant attaches particular importance to the words 'an amount equivalent to the premium *actually granted*' whereas the defendant relies on the words '*all* products . . . referred to'.

6. At first sight this wording, which moreover is identical to that of the proposal submitted to the Council by the Commission in the course of the legislative procedure,[3] might therefore seem self-contradictory.

7. The defendant's interpretation to the effect that on the grant of variable slaughter premium for sheep clawback must be charged on all products referred to in Article 1 (a) and (c) of Regulation No 1837/80 might give rise to doubts if its

* Translated from the German.

1 — Official Journal 1980, L 183, p. 1.

2 — Emphasis added.

3 — Official Journal 1984, C 62, p. 68.

proposition were taken to its logical conclusion; on that hypothesis, for example, where premium is granted for sheepmeat clawback would also have to be charged on goats and goatmeat — which even the defendant does not maintain is the case.

8. Such doubts are intensified if the original wording of Article 9 of Regulation No 1837/80 is compared with the wording at issue in this case. In the first place, the provision was extended so as to incorporate the charging of clawback on prepared meat as referred to in Article 1 (c); at the same time, however, the extent of the clawback was newly defined: whereas in the original version 'an amount equivalent to that premium' was to be charged, in the amended version 'an amount equivalent to the premium actually granted' is to be charged. At the very least it might be inferred from this more specific formulation that although clawback may be charged on all products referred to in Article 1 (a) and (c), the amount charged may only be that of the premium actually granted.

9. In addition, it should be pointed out that according to the original scheme of Regulation No 1837/80 variable slaughter premium could be granted without restriction for any type of sheep, thus including, for example, ewes and rams, which corresponded, at least in the case of ewes, to the applicant's previous practice under the system of special export certification (SEC). Not until the adoption of Commission Regulation No 3451/85 of 6 December 1985, on the basis of Article 9 (4) of Regulation No 1837/80, did the Commission, through the new version of Article 1 of Regulation No 1633/84, deprive the applicant of the possibility of granting a variable premium for all sheep by providing that rams or ewes or their carcases would not qualify for the premium.

10. As a result of the Commission's restriction of the types of animals eligible for variable premium the expression 'all' products referred to in Article 1 (a) and (c) of Regulation No 1837/80, in the version set out in Regulation No 871/84 of 31 March 1984, relied upon so insistently by the Commission, lost part of its meaning since from then on not all products were eligible for slaughter premium.

11. The foregoing comments suggest that I am of the opinion that the contested regulations adopted by the Commission are not covered by Article 9 (3) of Regulation No 1837/80. The fact that I am not, however, of that opinion is attributable to the decisions of the Court of Justice which acknowledge that the Commission of the European Communities has a large measure of independence even in the adoption of implementing measures.

12. Thus, for example, the Court of Justice held in its judgment of 30 October 1975 in Case 23/75[4] that when Article 155 of the EEC Treaty provides that the Commission is to exercise the powers conferred on it by the Council for the implementation of the rules laid down by the latter, it follows from the context of the Treaty in which the provision must be placed and also from practical requirements that the concept 'implementation' must be construed liberally. Since the Commission alone is in a position to follow continuously and atten-

4 — *Rey Soda* v *Cassa Conguaglio Zucchero* [1975] ECR 1279, at pp. 1300 and 1301.

tively trends on the agricultural markets and to act swiftly in accordance with the demands of the situation, the Council may be prompted to confer on the Commission wide powers of discretion and action in the sphere of the common agricultural policy. Further, Article 155 allows the Council to determine any conditions to which it may subject the exercise by the Commission of the powers conferred on it. When the Commission's powers are to be exercised under what is known as the 'management committee' procedure, this enables the Council to confer on the Commission a wide power of implementation whilst reserving where necessary its own right to intervene. Where the Council has in this way conferred extensive competence on the Commission the limits of that competence must be judged in the light of the basic general objectives of the organization of the market and less in terms of the literal meaning of the enabling provision.

13. It was precisely to the principles just described that the Court had recourse in its judgment of 11 March 1987 in Joined Cases 279/84, 280/84, 285/84 and 286/84 [5] in which it accepted a merely indirect link between the implementing regulation adopted by the Commission and the basic Council regulation as a sufficient enabling basis for the former. [6]

14. In the light of those decisions, which recognize that the defendant enjoys a large degree of autonomy in implementing Council regulations, it cannot be regarded as unlawful if the defendant, with a view to attaining one of the objectives referred to in Article 39 of the EEC Treaty, in this case the stabilization of the markets, bases itself on individual passages of a Council regulation which is not completely free of contradictions, for the purpose of inferring authority for its own activities. The detailed implementation of Regulation No 1837/80 by Regulation No 871/84 has ultimately not resulted in a position of absolute clarity. Whilst provision was made for the charging of an amount 'equivalent to the premium actually granted', the possibility of charging that amount was simultaneously extended to 'all' products referred to in the relevant provision. In view of the wide discretion vested in the Commission in deciding questions of economic policy, it could rely on the passage of the enabling provision which it wished to call in aid for the purpose of attaining its objectives.

15. The Commission's statement that the effects of payment of variable slaughter premium had to be offset by the charging of clawback must also be examined in the light of its extensive discretion in matters of economic policy, to which I have already referred several times; those effects may also be seen, according to the Commission, in the case of products in respect of which sheepmeat producers were not granted a premium. It would in the Commission's opinion be naïve to assume that a premium which is granted in respect of a large proportion of sheepmeat production in the United Kingdom (approximately 85%) has no effect on the price of sheepmeat in respect of which no premium is granted.

16. It has not become apparent during the course of the proceedings that that view is wholly unfounded. Although it might have been desirable for the defendant to have furnished reviewable evidence in support of

5 — *Walter Rau Lebensmittelwerke and Others* v *European Economic Community (represented by the Commission of the European Communities)* [1987] ECR 1069.

6 — Thus the Court found in the result that there was sufficient authority for the Commission's Christmas butter scheme in that the measure in question was consistent with the objectives of Articles 6 and 12 of Regulation No 804/68 of the Council of 24 June 1968 on the common organization of the market in milk and milk products (Official Journal, English Special Edition 1968 (I), p. 176) and with the objectives of the Council's implementing regulations which related to matters other than the Christmas butter scheme, although the individual procedural steps laid down in Articles 6 and 12 of Regulation No 804/68 were not fully complied with.

its view in the form, possibly, of economic analyses of the cost calculations of sheepmeat producers in Great Britain, it cannot, however, be excluded that the payment of variable slaughter premium in fact leads to competitive advantages for sheepmeat producers in Great Britain.

17. In addition, it must be pointed out that the regulation can also be justified by reference to Article 9 (4) of Regulation No 1837/80. According to that provision the Commission may adopt detailed rules for the application of Article 9, in particular rules for the measures necessary to prevent any disturbance of trade resulting from the application of variable slaughter premium. The defendant considers that the fact that the proportion of ewes in the total exports of sheepmeat from Great Britain to France has risen constitutes such disturbance. Although the defendant has not produced any wholly reliable evidence to demonstrate what was the cause of that shift in the composition of trade patterns, it did refer to inquiries made by it on the French markets. Moreover, it is difficult to determine what is to be regarded as normal trade in the context of the common organization of the market in sheepmeat and goatmeat. I refer to developments in this sector, in particular the 'mutton and lamb war' between the United Kingdom and France which led to the Court's judgment in Case 232/78[7] and subsequently to the gradual establishment of a common organization of the market, the final stage of which has not yet been completed. Precisely because the market organization in question is still a 'market organization in the process of formation' which continues to encompass differing regional intervention systems,[8] it is not possible to show that the Commission has adopted a measure which is manifestly improper.

18. It cannot therefore be successfully denied that the two contested regulations find in Article 9 of Regulation No 1837/80, in the 1984 version of that article, an adequate legal basis in the light of Community law as it stood at that time, this being the only question to be determined here.

(2) *Misuse of powers*

19. The applicant complains that the defendant used the powers conferred on it by Article 9 of Regulation No 1837/80 for the purpose of fixing exports of the various types of sheepmeat from Great Britain to France at a specific level in relation to each other and not for the purpose of offsetting any disturbance in competition which might result from the grant of variable slaughter premium. The defendant disputes that view.

20. Although the statements made by the defendant in the context of the management committee did not relate directly to the legislation at issue in this case, the defendant's intention to keep the level of trade in sheepmeat, and especially in the meat of ewes, within certain limits may, nevertheless, be inferred from them.[9]

7 — Judgment of 25 September 1979 in Case 232/78 *Commission of the European Communities* v *French Republic* [1979] ECR 2729.

8 — To this extent the defendant is in a better position in this case than in Joined Cases 279, 280, 285 and 286/84 which, in contrast to the present case which concerns a market organization in the process of formation, related to a fully formed market organization with a uniform intervention system applicable throughout the Community.

9 — See, in particular, the minutes of the meeting of 4 November 1985 at which the defendant referred to an alteration in the rate of clawback should the proportion of ewes in the total exports of sheepmeat to France fall outside a bracket of 19.5 to 24.4%.

21. In the course of the proceedings before the Court the defendant explained that, when faced with two contradictory claims, namely on the one hand that no clawback should be charged, as was demanded by the applicant and, on the other, that clawback of 100% should be charged, which the intervener considers to be the correct approach, it had to try to find a middle way between those two positions.

22. Since according to Article 9 (4) of Regulation No 1837/80, in the 1984 version of that provision, the measures to be adopted by the Commission include in particular those measures necessary to prevent any disturbance of trade resulting from the application of variable slaughter premium and thus to stabilize the markets, which still display differences between them, in accordance with Article 39 of the EEC Treaty, it must be concluded that, in the circumstances which obtained,[10] the defendant's action in this respect kept within the ambit of the objectives of the common organization of the market in sheepmeat and goatmeat and of the EEC Treaty. Consequently, the Commission has not misused its powers.

(3) *Breach of the principle of the free movement of goods*

23. The applicant regards the charging of clawback as an export duty prohibited by Article 9 of the EEC Treaty and as a breach of the prohibition of quantitative restrictions on exports between Member States.

24. The defendant, on the other hand, refers to the Court's judgment of 15 September 1982 in Case 106/81[11] in which it was held that the effects of the payment of variable slaughter premium could be offset and that the corresponding clawback was not to be regarded as an export duty.

25. At this point it must first be remarked that the aforementioned judgment of 15 September 1982 gave a ruling on the market organization in sheepmeat and goatmeat in its original form. Originally, when adopted in 1980, Regulation No 1837/80 distinguished between a uniform basic price for sheepmeat in the Community and various reference prices in the different regions of the Community. In 1980 the uniform basic price was ECU 345 per 100 kg whilst the regional reference prices varied from ECU 293 per 100 kg for the United Kingdom to ECU 345 for France and ECU 375 per 100 kg for Italy. Consequently, when the common organization of the market entered into force, account was taken of the different market prices in the Community. In 1984 the market prices were standardized: the reference prices were abolished and a uniform basic price of ECU 428 per 100 kg was fixed.[12] The situation today is therefore different and conclusions reached in 1982 cannot be applied to it without qualification.

26. Since Article 5 of Regulation No 1837/80, in its original text of that regulation, provided that the premium intended to offset loss of income was to be calculated by reference to the difference between the reference price and the market price, since Article 9 thereof provided however that the variable slaughter premium was to be calculated by reference to the difference between the market price and the basic price, and since the reference price for region 5 (at that time the United Kingdom;

10 — See above, paragraph 17.

11 — *Julius Kind KG* v *European Economic Community* [1982] ECR 2885.

12 — Council Regulation No 873/84 of 31 March 1984 (Official Journal 1984, L 90, p. 42).

now Great Britain) was considerably lower than the basic price, it was in fact possible, when the Court delivered its judgment of 15 September 1982, to speak of a significant competitive advantage for sheepmeat producers in region 5 (United Kingdom). Not until the adoption of Council Regulation No 871/84 of 31 March 1984 was the difference between the reference price and the basic price abolished and consequently a uniform basic price laid down for the Community, which applied both to the calculation of the premium intended to offset loss of income and to the calculation of the amount of variable slaughter premium. As a result the various premium schemes for the individual regions of the Community no longer differ as regards the amount of the premium but merely as regards the time of payment.

27. In view of the considerable difference in the organization of the intervention system when the common organization of the market in sheepmeat and goatmeat entered into force and in view of the less precise wording of Article 9 (3) of Regulation No 1837/80, the Court stated in its judgment of 15 September 1982 in Case 106/81, to which several references have already been made, in the first place that the charge on exports provided for by Article 9 (3) of the regulation is inseparable in principle from the intervention system. Consequently, the charge did not constitute a charge having an effect equivalent to a customs duty but was in reality intended to offset exactly the effects of the slaughter premium, thereby enabling products from the Member States or regions in which the premium was granted to be exported to other Member States without disturbing their markets. If there were no clawback, offers emanating from a Member State which applied the slaughter premium might be made on markets in other Member States at prices appreciably lower than those obtaining on the markets of the latter States. [13]

28. Both parties rely on that extract from the Court's judgment of 15 September 1982 and then proceed once more to draw divergent conclusions by emphasizing different passages thereof. The United Kingdom takes the view that clawback may be charged only if it is intended to offset exactly the effects of the slaughter premium whilst the Commission considers it may be charged if it is intended to offset exactly the effects of the slaughter premium.

29. In that respect it should be pointed out in the first place that Case 106/81 was concerned with the charging of clawback on exports of sheepmeat in respect of which slaughter premium had in fact been granted. There was therefore no reason for the Court to examine the effects of granting variable slaughter premium on products for which no premium had been granted. Consequently, it is my view that few conclusions can be drawn from the above-cited part of the Court's judgment of 15 September 1982 for the purposes of the proceedings now before the Court whether in favour of the applicant's point of view or in favour of that of the defendant.

30. If, however, under the intervention system it is permissible by virtue of Article 9 (3) and (4) of Regulation No 1837/80, in the 1984 version of those provisions, to charge clawback also in respect of products for which variable slaughter premium has not been granted, then what was said by the

13 — See paragraph 21 of the Judgment.

Court of Justice in its judgment of 15 September 1982 [14] must continue to apply notwithstanding the further development of the common organization of the market in sheepmeat and goatmeat: the charging of clawback constitutes part of the intervention system. Consequently, it cannot be regarded as constituting a violation of the principles governing the free movement of goods.

(4) *Breach of the duty to provide a statement of reasons (Article 190 of the EEC Treaty)*

31. The United Kingdom submits that in the recitals in the preambles to the two contested regulations the Commission has made assertions which are not justified by the facts.

32. These formal submissions are related to the substantive submissions which have already been discussed. That discussion has shown that the Commission's evaluations of the economic factors belong to a field in which it has a wide discretion regarding economic policy because it has to assess a complex economic situation. In reviewing the exercise of that discretion the Court has hitherto restricted itself in its decisions to verifying whether the institution in question has committed a manifest error, has misused its powers or has manifestly exceeded its discretion.

33. As no such manifest errors could be found in the statement of reasons upon which the contested regulations are based and as the considerations upon which the defendant's decision rests are clear — which the Court has consistently held is all that is required precisely in the case of measures of general application [15] — there has been no infringement of Article 190 of the EEC Treaty.

C — Conclusion

In view of the foregoing I propose that the Court should dismiss the application and order the applicant to pay the costs, including those of the intervener.

14 — Especially paragraph 21.

15 — See, for example, the Court's judgment of 12 July 1979 in Case 166/78 *Italy* v *Council* [1979] ECR 2575, at p. 2597.